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DOMINIC LAU HOE CHAI v. MASZLEE MALIK & ORS

HIGH COURT MALAYA, PULAU PINANG
AMARJEET SINGH JC
[JUDICIAL REVIEW NO: PA-25-53-09-2019]
28 NOVEMBER 2019

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ADMINISTRATIVE LAW: *Judicial review – Application for – Application to quash decision on education policy – Decision to implement Jawi writing in Malay language subject taught at national type and national schools – Whether policy contravened art. 12(3) of Federal Constitution – Locus standi – Whether applicant 'adversely affected' by decision – Whether public interest litigation – Whether policy concerned matters of Malay language, national heritage and national identity – Whether amenable to judicial review – Rules of Court 2012, O. 53*

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The Cabinet, on 14 August 2019, made a decision to implement Jawi writing in the Malay language subject taught at the national type and national schools beginning in the year 2020 ('the decision') and that the basic text book of the Malay language subject to contain three pages on introduction to Jawi writing. The applicant, as the President of Parti Gerakan Rakyat Malaysia, a political party, sought the leave of the court under O. 53 of the Rules of Court 2012 ('ROC'), to commence an application for judicial review against the respondents for orders, *inter alia*, to quash the decision. The applicant contended that the decision, which was an education policy, was unconstitutional and/or policy that was made without taking into account relevant considerations including the views of the members of Parliament, Chinese and Tamil associations and non-governmental organisations such as the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism. The grounds advanced by the applicant were that: (i) the policy contravened art. 12(3) of the Federal Constitution ('art. 12(3)'); and (ii) the policy was confusing, burdensome and unreasonable and what ought to be the appropriate policy the respondents should implement or consider implementing.

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Held (dismissing application for leave):

(1) It is a requirement of O. 53 r. 2(4) of the ROC that only persons who are 'adversely affected' by the decision of a public authority are entitled to make the application. To fall within the factual spectrum of 'adversely affected' the applicant must show either an obviously sufficient personal interest in the legality of the action impugned which included cases where the complaint was that his fundamental right had been or was being or was about to be infringed, or to show that the case was being brought in the nature of a public interest litigation for the purpose of redressing public injury, enforcing public duty, protecting social rights or vindicating public interest. (paras 6 & 7)

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(2) The applicant had passed the test of threshold *locus standi* as the applicant had framed and brought these proceedings in the nature of public interest litigation as a citizen, parent and leader of a political party whose members were also parents. The decision to implement Jawi writing at the schools had generated considerable public discourse and debate. The applicant saw the implementation of Jawi writing as a means of imposing the religion of Islam on students whose religion was other than Islam. The applicant's opinion was premised on the fact that Jawi writing was closely connected to the teachings of Islam and the script for the holy text of the religion, the Al-Quran is written in Jawi. The applicant therefore relied on art. 12(3) to strike down the policy to implement Jawi writing at the said schools so that students would not be receiving instruction of a religion other than their own. (para 9)

(3) Based on art. 12(3) and 12(4), it was clear that a student in any school is protected from receiving any instruction in a religion other than his own except if allowed by his parents. However, there is nothing in art. 12(3) that prohibits the learning of a particular language, the script of which also incidentally forms the script of a holy text of a religion. There was not an iota of evidence, apart from the applicant's supposition and opinion, that the teaching of Jawi writing would amount to a student receiving instruction in a religion other than his own. The syllabus or what Jawi writing entailed was yet to be announced. The teaching of Jawi writing, like the teaching of the Rumi writing, is the method to learn the script of the Malay language, which is the national language. There was therefore no arguable case shown for further investigation at the substantive hearing of a perceived breach of art. 12(3). (para 16)

(4) The policy of Jawi writing concerned matters of the Malay language, national heritage and national identity and were clearly considerations of non-legal factors. Any evaluation of these factors would be an act of entering into the domain which belonged solely to the executive. Therefore, any inquiry weighing the pros and cons of the policy and to test the degree of its beneficial disposition based on however sound and good reasoning advanced by the applicant, should be avoided. Therefore, the wisdom and reasons taken by the Cabinet in deciding to implement Jawi writing at the said schools was not amenable to judicial review. (paras 20 & 21)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***
Malik Brothers v. Narendra Dadhich AIR 1999 SC 3211 ***(refd)***
Manoharan Malayalam & Anor v. Dato' Seri Mohd Najib Tun Hj Abdul Razak & Ors [2013] 8 CLJ 1010 CA ***(dist)***
Marcel Jude Joseph & Anor v. The Minister Of Education & Ors [2013] 1 CLJ 1106 HC ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***
Rev Christopher Mtikila v. the Attorney-General (Civil Case No. 5 of 1993) (Unreported) ***(refd)***
Robert Linggi v. The Government of Malaysia [2011] 7 CLJ 373 HC ***(dist)***
The Government of Malaysia v. Robert Linggi [2015] 1 LNS 1515 CA ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 12(3), (4), 152(1)
National Language Acts 1963/67, s. 9
Rules of Court 2012, O. 53 r. 2(4)

The Constitution of the United Republic of Tanzania (Cap 2) [Tanzania], art. 26(2)

Other source(s) referred to:
MP Jain & SP Jain, *Principles of Administrative Law*, 6th edn, p 1069

For the applicant - Tan Lee Kiat & Mak Kah Keong; M/s K K Mak & Co
For the respondent - Ahmad Hanir Hambaly; SFC

Reported by S Barathi

JUDGMENT

Amarjeet Singh JC:

Introduction

[1] The applicant is seeking leave of court under O. 53 of the Rules of Court 2012 to commence an application for judicial review against the Minister and Deputy Minister of Education, the Ministry of Education and the Government of Malaysia. The reliefs that the applicant is seeking are as follows:

(i) an order of *certiorari* to quash the decision to implement Jawi writing in the Malay Language or Bahasa Melayu subject for standard 4 students beginning with the year 2020 followed with standard 5 students in the year 2021 and standard 6 students in the year 2022 at the National Type Schools on the condition that such implementation must be agreed to by the Parent Teacher Association ("PTA"), parents and students of the school;

(ii) an order of *certiorari* to quash the decision to implement Jawi writing in the Malay Language subject for standard 4 students beginning with the year 2020 followed with standard 5 students in the year 2021 and standard 6 students in the year 2022 at the National Schools; and

(iii) a prohibition order to prohibit the respondents from implementing Jawi writing in the said schools.

Background

[2] The decision to implement Jawi writing in the Malay Language subject taught at the National Type and National schools beginning with the year 2020 was made by the Cabinet on 14 August 2019 ("the said decision"). The said decision was circulated to the public *via* a media statement on the same date. Apart from the date of implementation and the targeted group of students, the Cabinet also decided that the basic textbook of the Malay Language subject contains three pages on introduction to Jawi writing.

[3] The applicant brings this proceeding as the President of Parti Gerakan Rakyat Malaysia, a political party. In his O. 53 statement in support of the application, the applicant contends that the said decision which is an education policy is unconstitutional and/or a policy that was made without taking into account relevant considerations including the views of the members of Parliament, Chinese and Tamil associations and non-governmental organisations such as the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism. The applicant has advanced two grounds in support of the reliefs he is seeking:

(i) that the policy contravenes art. 12(3) of the Federal Constitution ("art. 12(3)");

(ii) that the policy is confusing, burdensome, and unreasonable and what ought to be the appropriate policy the respondents should implement or consider implementing.

The Submissions

[4] The Senior Federal Counsel who appeared for the Attorney General apprised me of three features in the present case as to why leave should not be granted. The features are that:

(i) the applicant has no threshold *locus standi*;

(ii) the decision sought to be quashed is a policy decision that is not amenable to judicial review; and

(iii) no arguable case is shown for leave to be granted.

[5] The applicant in response submitted that leave should be granted:

(i) as the applicant as a concerned citizen and parent has *locus standi* to challenge acts of the Executive including policy decisions which are perceived as violating the Federal Constitution and cites the High Court

A case of *Robert Linggi v. The Government of Malaysia* [2011] 7 CLJ 373; [2011] 2 MLJ 741 which was followed by the Court of Appeal in *Manoharan Malayalam & Anor v. Dato' Seri Mohd Najib Tun Hj Abdul Razak & Ors* [2013] 8 CLJ 1010; [2013] 5 MLJ 186 in support of his standing;

B (ii) the question whether the impugned policy violates art. 12(3) is an arguable case that requires investigation at the substantive hearing; and

(iii) that the impugned policy is irrational and failed to take into account relevant aspects and considerations including the views of the relevant stakeholders.

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The Decision Of The Court

Threshold Locus Standi

[6] The first issue to be decided is whether the applicant has threshold D *locus standi* to make this application. It is a requirement of O. 53 r. 2(4) of the Rules of Court 2012 that only persons who are "adversely affected" by the decision of a public authority are entitled to make the application.

[7] In this regard, it was established in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525 E ("*MTUC*") that the "adversely affected" test is the single test for all remedies sought by way of judicial review applications under O. 53 of the Rules of Court 2012. To pass the test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary to establish an infringement of a private right or the suffering of special damage. The Federal F Court agreed with the principle in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 which established that to fall within the factual spectrum of "adversely affected" the applicant must show either an obviously sufficient personal interest in the legality of the action impugned which includes cases where the complaint is that his fundamental right has G been or is being or is about to be infringed, or to show that the case is being brought in the nature of a public interest litigation for the purpose of redressing public injury, enforcing public duty, protecting social rights or vindicating public interest (*Malik Brothers v. Narendra Dadhich* AIR 1999 SC 3211).

H **[8]** Thus, only the threshold test of *locus standi* stated in *MTUC* applies to all judicial review applications. The test relied by the applicant as stated in *Robert Linggi* and *Manoharan* does not apply as those cases were not judicial review applications made pursuant to O. 53 of the Rules of Court 2012. In any event, the Court of Appeal in *The Government of Malaysia v. Robert Linggi* [2015] 1 LNS 1515 pointed out that the principle in the Tanzanian High I Court case of *Rev Christopher Mtikila v. the Attorney-General* (Civil Case No. 5 of 1993) which was the basis of the decision of the High Court in *Robert Linggi* is inapplicable in Malaysia as that case was decided premised

on art. 26(2) of the Tanzanian Constitution which states that, "Every person is entitled, subject to the procedure provided for by law, to institute proceedings for the protection of the Constitution and legality". Thus, the Court of Appeal held that the Constitution of Tanzania had vested its citizens with double capacity: the capacity to seek redress as an individual and the capacity to seek redress as a member of the community. The Federal Constitution does not have a similar provision. It is trite that principles in cases based on specific provisions of a foreign constitution do not apply in Malaysia (*Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187).

[9] In applying the principle in *MTUC* to the facts of the present case, I am satisfied that the applicant has passed the test of threshold *locus standi*. The applicant has framed and brings these proceedings in the nature of public interest litigation as a citizen, parent an leader of a political party whose members are also parents. The decision to implement Jawi writing at the said schools has generated considerable public discourse and debate. The applicant sees the implementation of Jawi writing as a means of imposing the religion of Islam to students whose religion is other than Islam. The applicant's opinion is premised on the fact that Jawi writing is closely connected to the teachings of Islam and the script for the holy text of the religion, the al-Quran is written in Jawi. The applicant therefore relies on art. 12(3) to strike down the policy to implement Jawi writing at the said schools so that students would not be receiving instruction of a religion other than their own.

Test To Be Satisfied At Leave Stage

[10] The next step of the inquiry is to determine whether the applicant has satisfied the test for granting leave. It is settled law that an applicant must demonstrate that his application is not frivolous and that an arguable case in favour of granting the reliefs sought at the substantive hearing may be the resultant outcome. In determining whether such an arguable case is demonstrated or not, I am not entitled to embark on examining the substantive merits of the application and must keep in mind that the threshold for granting leave is very low. This step however will not arise if the subject matter for review is either non-justiciable or not amenable to judicial review. (see Federal Court decisions in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; and *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805).

Arguable Case And The Amenability To Review

[11] It is not in dispute that the decision sought to be reviewed is an education policy sought to be implemented by the Federal Government. The Federal Court in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009 had laid down the following principles where a policy decision is sought to be reviewed:

(i) the question whether a decision based on policy considerations is amenable to judicial review may be determined at the leave stage if the evidence of the impugned policy is before the court as evidenced in the affidavits and that it is not a requirement that the issue must be decided after hearing all the evidence at the substantive hearing;

(ii) there is no purpose of granting leave when the facts do not make out an arguable case for investigation at the substantive hearing;

(iii) a policy decision is not amenable to judicial review if the policy emanates after consideration of non-legal or technical factors as the court does not possess the necessary information and expertise to evaluate such factors and to pass judgment on the appropriateness or adequacy of a particular policy; and

(iv) it is not within the domain of the court to weigh the pros and cons of the policy or to scrutinise it and test the degree of its beneficial or equitable disposition for the purpose of varying or annulling it, based on howsoever sound and good reasoning, unless the policy violates the Federal Constitution or any written law, or is arbitrary, or there exist elements of *mala fides* or abuse of power (following MP Jain and SP Jain in their book *Principles of Administrative Law* (6th edn) at 1069).

[12] I will first consider the issue whether an arguable case is demonstrated by the perceived contravention of art. 12(3) of the Federal Constitution through the implementation of Jawi writing in the Malay Language subject at the said schools. The connection between Jawi writing and the Malay language is provided by art. 152(1) of the Federal Constitution which reads as follows:

> The national language shall be the Malay language and shall be in such script as Parliament may by law provide: ...

and Parliament specifically enacted s. 9 of the National Language Acts 1963/67 providing for the script of the Malay language in the following words:

> The script of the national language shall be in the Rumi script: provided that this shall not prohibit the use of the Malay script, more commonly known as the Jawi script, of the national language.

[13] Thus, the Jawi script is also the script of the national language or bahasa kebangsaan (as stated in the Malay text of the Federal Constitution) which is the Malay language. The Federal Government has decided to implement the learning of the Jawi script of the national language by teaching Jawi writing as part of the Malay Language subject at the said schools.

[14] The applicant's complaint is that the policy to implement Jawi writing in the Malay Language subject at the said schools would violate art. 12(3) which reads as follows:

> No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

[15] The applicant, as shown above, pegs his case on the fact that Jawi writing uses verses from the religion of Islam and that the holy text of the religion, the al-Quran is in the Jawi script and therefore the teaching of Jawi writing at the said schools would cause or result in non-Muslim students to receive instructions in a religion other than their own.

[16] Having read arts. 12(3) and 12(4) with care, it is very clear to me that a student in any school is protected from receiving any instruction in a religion other than his own except if allowed by his parents. However, there is nothing in art. 12(3) that prohibits the learning of a particular language the script of which also incidentally forms the script of a holy text of a religion. The learning of a language is not an issue under art. 12(3). It will become an issue only if in teaching the language, a student is caused to receive instruction in a religion other than his own. There is not an iota of evidence apart from the applicant's supposition and opinion that the teaching of Jawi writing would amount to a student receiving instruction in a religion other than his own. The syllabus or what Jawi writing entails is yet to be announced. The teaching of Jawi writing like the teaching of the Rumi writing is the method to learn the script of the Malay language which is the national language. There is therefore no arguable case shown for further investigation at the substantive hearing of a perceived breach of art. 12(3).

[17] I now turn to the second issue: whether the policy to implement Jawi writing at the said schools is amenable to judicial review. I have considered the material produced by the applicant and am satisfied that the policy decision to implement Jawi writing is not amenable to judicial review. It follows that no arguable case can therefore arise for further investigation at the substantive hearing. My reasons are as follows.

[18] The policy to implement teaching of Jawi writing in the Malay Language subject at the said schools is the exclusive right of the Federal Government which decides what kind of education policy should be implemented in the whole of Malaysia. The Minister of Education explained in Parliament, as reported in the Hansard dated 21 October 2019, on the policy to implement Jawi writing as follows:

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> ... ingin dijelaskan di sini bahawa tulisan jawi bukanlah merupakan satu mata pelajaran atau subjek, tetapi diperkenalkan sebagai aspek seni Bahasa yang merupakan strategi dan aktiviti bagi menyokong pelaksanaan kemahiran Bahasa, selain memperkayakan murid dengan pengetahuan mengenai seni, warisan dan Bahasa Melayu itu sendiri ... Selain daripada itu, tulisan jawi juga akan diperkenalkan sebagai national heritage atau pun sebagai warisan kebangsaan dan national identity atau identiti kebangsaan. Ini selaras dengan tulisan jawi yang tercatat dan termaktub dalam jata negara dan jata negeri.

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[19] The applicant contends that the implementation of Jawi writing will confuse the students as to the learning of the Malay language and will C increase the burden on the students and teachers. It is also argued that the policy is unreasonable on the ground that it does not have any practical and important value to help the students to improve the learning of the Malay language as the official writing of the Malay language is Rumi. The applicant instead suggested that the appropriate policy is for Jawi writing to be D introduced at university level or in art classes instead of the Malay Language subject. It was also suggested that excursions to museums could be made to introduce students to Jawi writing.

[20] The Federal Government through the Education Minister has explained the policy of Jawi writing in Parliament. The policy clearly E concerns matters of the Malay language, national heritage and national identity which were amongst the factors taken into account by the Cabinet. These are clearly considerations of non-legal factors. In my judgment, any evaluation of these factors would be an act of entering into the domain which belongs solely to the Executive. Therefore, any inquiry weighing the pros F and cons of the policy and to test the degree of its beneficial disposition based on however sound and good reasoning advanced by the applicant should be avoided. In this regard, I can do no better than quote the learned judge in *Marcel Jude Joseph & Anor v. The Minister of Education & Ors* [2013] 1 CLJ 1106 when faced with a similar challenge to an education policy:

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> The simple implication is that unless it is specifically provided for in the Federal Constitution or any other legislation, no such restriction is placed on the government in formulating policy for the education system in the country. Hence the introduction or reversal of PPSMI (or the teaching and learning of science and mathematics in the English language) is a matter of government policy, nothing more, nothing less. Policies of the H government of course cannot be questioned by the Court of Law which concerns only with interpretation of law enacted by Parliament. The executive arm of the government decides what policy should be implemented and if the people are not happy, their remedy lies with the court of public opinion.

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[21] I therefore hold that the wisdom and reasons taken into account by the Cabinet in deciding to implement Jawi writing at the said schools is not amenable to judicial review.

Conclusion

[22] For the reasons given above, the application for leave is dismissed.